Los Angeles Water and Power Employees' Association *and* Communications Workers of America, AFL–CIO, Petitioner. Case 21–RC–20514

November 28, 2003

DECISION, DIRECTION, AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held September 12, 2002, and the hearing officer's report recommending disposition of them. The Board conducted the election pursuant to a Stipulated Election Agreement (the Agreement). The tally of ballots shows 2 for and 1 against the Petitioner, with 2 determinative challenged ballots.

The Board has reviewed the record in light of the exceptions and brief,[1] and adopts the hearing officer's findings, conclusions, and recommendations only to the extent consistent with this decision.

The Employer challenged the ballot of lead clerical Sonae Clark on the ground that she is a supervisor under the Act. The Union challenged the ballot of Julie Surmeian on the ground that her job classification, "accountant," is not included in the stipulated bargaining unit.

We find, in agreement with the hearing officer, that the Employer failed to establish that Clark is a supervisor under Section 2(11) of the Act. Therefore, we overrule the Employer's challenge to her ballot. We reverse the hearing officer's finding that the parties intended to exclude the job classification of "accountant" from the bargaining unit. Under a "community-of-interest" analysis, we include Surmeian in the unit. Therefore, we also overrule the challenge to Surmeian's ballot.

A. The Challenge to Sonae Clark's Ballot

The hearing officer found that the record evidence did not establish that Clark is a supervisor within the meaning of Section 2(11) of the Act and, therefore, that the challenge to her ballot must be overruled.[2] The Employer excepts, contending that Clark is a supervisor under Section 2(11), because she acts for Office Manager Bryan Grace when he is out of the office, and because Clark has authority to assign employees and effectively recommend the hiring and disciplining of employees. We find no merit to those contentions.[3]

1. Facts

The Employer is a nonprofit corporation that provides benefits and services to employees and retirees of the Los Angeles Department of Water and Power (LADWP). It is a small organization, made up of only a few employees. Bryan Grace is the office manager and a conceded supervisor. Sonae Clark is the lead clerical. Julie Surmeian is the accountant. The other employees work as cashiers and clericals. All of the office workers are cross-trained, so that they can fill in for one another during breaks or when an employee is out, or assist an employee who is particularly busy. In addition, certain employees are specifically designated as the first or second backup for other employees.

The Employer has a 15-member board of directors, made up of employees of the LADWP. The board members also serve on various committees, such as the assistance committee, the investment and finance committee, and the activities committee. Each committee has a committee liaison, who is an employee of the Employer.

Office Manager Grace earns approximately $28 per hour. Clark earns $18.26 per hour. Surmeian earns $24.37 per hour. The other office workers earn $12.20 per hour.[4] Each of the office workers, including Clark, has a partitioned desk area in the common office space. All of them report to Grace. Clark and the other office workers receive the same benefits and have access to the same lunchroom and restrooms.

As lead clerical, Clark handles various administrative matters, such as setting up for board meetings, making phone calls, and ordering paper supplies. In addition, Clark is the Employer's liaison to the assistance committee, the committee that approves loans for LADWP employees. As liaison, Clark prepares the agenda, attends weekly committee meetings, takes and types the meeting minutes, and compiles the committee's monthly report. She also spends considerable time working up loan applications. This involves verifying information provided

[1] No exceptions were filed to the hearing officer's findings that Julie Surmeian is not a managerial employee or a professional employee under Sec. 2(12) of the Act.

[2] We disavow the hearing officer's discussion of whether the parties intended to include Clark's position, "lead clerical," in the stipulated bargaining unit. No party raised this issue before the hearing officer or in exceptions to the Board. Therefore, the issue is not before us.

[3] In its exceptions, the Employer also argues that the hearing officer erred in disregarding the testimony of Susan Muszalski. Assuming, without deciding, that the Employer is correct, we have examined the testimony and find that it does not require a different result. Muszalski's testimony does not contain any evidence concerning Clark's authority that was not also testified to by Grace and/or Clark.

[4] Both Clark and Surmeian have worked for the Employer for over 13 years. The other office clericals have worked there for between 3 and 7 years.

by employees and determining whether applications are complete. She also handles correspondence and arranges for payroll deductions related to approved loans. Clark has authority to approve certain monetary advances without committee approval and to sign checks that are for no more than $200.

When Grace is out of the office, Clark is authorized to act in his place. Grace works a flexible schedule and takes off every other Friday. Clark acts as "supervisor" on those days, and also when Grace is on vacation or sick leave, or away from the office on business. Grace is generally not available by telephone on his days off, but if a serious problem arises Clark is required to call him. In addition, Clark can and does call the board president or other board members if a problem arises. Clark is responsible for performing her normal job duties on the days that she is acting for Grace.

When acting for Grace, Clark is also responsible for dealing with customer service problems that Grace would normally handle. If she cannot resolve the problem, she contacts the board president. In addition, Clark is the person the other employees notify if they are going to be late or absent, and Clark is authorized to verify and initial employee timecards. Clark has never told an employee that he or she could not come in late or take a day off. On occasion, Clark tells employees to fill in for, or assist, another employee and when to take their lunch or other breaks.

One Friday when Grace was away, Clark called off duty employee Leslie Vernon to come in, because the office was short handed. Grace had previously authorized Clark to take such an action if short staffed. Clark does not have authority to require an offduty employee to come in. Neither Grace nor Clark can authorize overtime; all overtime must be preapproved by the board of directors.

On one occasion when Grace was on vacation, Clark had to decide whether the Employer would set up a booth at the LADWP's book fair. Clark contacted both the board president and vice president to get approval for the booth, which she received. Clark also organized volunteers to man the booth. This involved asking employees to volunteer for an hour timeslot, and to seek out board members to fill in when employees were not available.

The board approves all formal disciplinary actions. Clark can talk to employees about their conduct, but she cannot issue the type of verbal warning that could be documented in an employee's personnel file. Clark must report any serious employee misconduct to Grace and/or the board. When the board is considering a disciplinary action, it conducts its own investigation. There is no evidence that, in determining whether to discipline employees, the board has ever considered any discussions between Clark and other employees about their conduct.

Since being promoted to lead clerical, Clark has been participating in interviewing job applicants.[5] Specifically, she and Grace interview applicants together. They begin by asking questions about the applicant's resume, and then alternate asking questions from a preprinted list of questions. When Clark is not available, Grace has accountant Surmeian or an available clerical participate in the interview. Both Grace and Clark give the applicant a numerical score based on his or her answers to the preprinted questions. After the interview, Grace and Clark meet to discuss the candidate and to decide whether Grace should recommend the candidate to the board for approval.[6] Grace would not recommend an applicant that Clark did not also favor. The board has ultimate authority with respect to all hiring.

2. Analysis

We find that the Employer failed to prove that Clark is a supervisor under Section 2(11) of the Act.[7] It is undisputed that Clark does not have the authority to suspend, lay off, recall, promote, discharge, or reward employees, or to effectively recommend such action. Moreover, the Employer failed to show that, when acting in the absence of the office manager, Clark performs 2(11) functions with independent judgment.[8] Finally, although Clark has some authority to assign and discipline employees, and some authority with respect to hiring, the evidence shows that Clark's responsibilities in those areas are routine and do not require the exercise of independent judgment.

The Employer relies heavily on the undisputed evidence that Clark is in charge of the office when Officer Manager Grace is out. However, as the hearing officer noted, much of the responsibility that Clark assumes in Grace's absence involves handling customer service issues, not employee matters. For example, Clark is responsible for responding to customer complaints, which Grace would usually handle.

[5] Although most applicants are from temporary employment agencies, they are interviewed with the intention that, if hired, they will begin as temporary employees, but later become regular employees.

[6] It is unclear whether, when Surmeian or another clerical substitutes for Clark, they have the same involvement following the interview as Clark, or whether they merely participate in the interview.

[7] The burden of demonstrating supervisory status rests with the party asserting it. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001).

[8] The Employer filed with its exceptions an affidavit with an attached disciplinary notice that, it claims, demonstrates Clark's authority to sign payroll checks. Without deciding whether these materials are properly before the Board, for reasons of administrative economy, we have looked at the materials and find that, even if properly before us, they would not require a different result. The authority to sign payroll checks is not a supervisory function under Sec. 2(11) of the Act.

Although, in Grace's absence, Clark occasionally tells employees to fill in for another employee who is out or on a break, she does not exercise independent judgment in doing so. Rather, as discussed, all of the employees are cross-trained and expected to cover for one another, and are designated to act as backup for specific jobs. Therefore, Clark's role is simply to notify the employees that they need to assume that backup role. This type of routine shifting of employees does not evidence supervisory status. See *Hexacomb Corp.*, 313 NLRB 983, 984 (1994) (finding that individuals are not supervisors despite authority to "shift employees around . . . to get projects done").

Similarly, even though Clark has authority to verify and initial employee timecards and sign time off requests in Grace's absence, this function is routine and clerical. See *Oil Workers v. NLRB*, 445 F.2d 237, 243 fn. 5 (D.C. Cir. 1971) (stating that "timecard approval does not convert an employee into a supervisor"); *Fleming Cos.*, 330 NLRB 277, 280 (1999); *John N. Hansen Co.*, 293 NLRB 63, 64 (1989). Indeed, the undisputed testimony shows that Clark can sign off on the timecards at any point during the day—even before the employees actually work the hours that she is purportedly "verifying." In these circumstances, it is clear that Clark is not, in fact, verifying the hours worked, and that her initialing the cards is merely a ministerial task.

The Employer also argues that, when Grace is out, employees notify Clark when they are going to be late or out, and that Clark has authority to grant or deny such requests. However, Clark denied ever turning down such a request, and Grace, who testified that Clark has such authority, failed to point to a single specific instance in which she did so. Therefore, the evidence fails to show that Clark has the authority to grant or deny time off. Rather, the employees are "merely providing notification that [they] will not be in." *Fleming Cos.*, 330 NLRB at 280–281.

The Employer also places much weight on evidence that Clark assigned employees to staff a booth at LADWP book fair. However, this task did not require independent judgment. Clark merely asked employees to volunteer for a timeslot. If a timeslot was not filled, Clark called board members, not employees, to fill in.

Similarly, Clark's authority with respect to employee lunch and other breaks does not rise to the level of supervisory authority. The evidence shows that the employees as a group work out when they are going to take breaks. If the employees cannot agree, Clark may have to step in, but doing so does not require the exercise of independent judgment. At most, Clark may direct an employee to take a break at a particular time, but preset backup assignments determine who fills in for whom during breaks. Therefore, Clark does not need to assess workload or determine who is available to fill in for the employee on break. In these circumstances, Clark's authority with respect to employee breaks is not supervisory. See *NLRB v. Hilliard Development Corp.*, 187 F.3d 133, 146 (1st Cir. 1999) (holding that "determination of order of lunch and other breaks is essentially clerical").

The Employer also relies on the undisputed evidence that, on one occasion, Clark called employee Vernon into work on his day off, because the office was shorthanded. However, Office Manager Grace previously authorized Clark to take that action if short staffed. Moreover, although Clark could request that Vernon come in, she did not have the authority to require that he do so. See *Sherwood Corp.*, 321 NLRB 477, 478 (1996) (finding that authority is not supervisory where individual cannot require off duty employee to come in).

The evidence also undermines the Employer's claim that Clark has authority to discipline or effectively recommend discipline. Rather, Clark must report serious employee misconduct to Grace or the board. The board undertakes its own investigation and decides what, if any, disciplinary action to take. Thus, although Clark can talk to employees about their performance or attitude, and report to Grace about such matters, she does not effectively recommend discipline and she cannot issue any discipline. See *Ryder Truck Rental, Inc.*, 326 NLRB 1386, 1386 (1998) (authority to issue verbal or written warnings, "which do not affect the employee's status or contain recommendations for discipline, are not evidence of supervisory authority"). See also *Green Acres Country Care Center*, 327 NLRB 257, 257–258 (1998). Indeed, as stated, there is no evidence that the board of directors has ever considered any such discussions between Clark and other employees when determining whether to discipline an employee.

Finally, the Employer argues that Clark exercises supervisory authority with respect to hiring. It is undisputed that the board must approve all new hires. Although Clark participates in interviews and may discuss with Grace whether he should recommend to the board that an applicant be hired, Grace ultimately decides whether to recommend the candidate to the board, and the board decides whether to hire the applicant. There is no evidence that Clark has ever, on her own, interviewed a candidate for hire, and recommended to the board that the candidate be hired. In these circumstances, we do not find that Clark effectively recommends hiring. See *Ryder Truck Rental*, 326 NLRB at 1387–1388 fn. 9 (finding that where admitted supervisor also "participate[s] in the

interview process, it cannot be said that employees whose status is at issue have authority to effectively recommend hiring within the meaning of Sec. 2(11)").[9]

In sum, the evidence supports the hearing officer's finding that the Employer failed to prove that Clark is a statutory supervisor. Therefore, we overrule the Employer's challenge to Clark's ballot and order that it be opened and counted.

B. The Challenge to Julie Surmeian's Ballot

In the Stipulated Election Agreement (the Agreement), the parties defined the collective-bargaining unit as:

> All full-time and regular part-time employees including board liaisons, benefit administrators, cashiers, and clerks employed by the Employer at its facility located at 111 North Hope Street, Room A-17, Los Angeles, California; excluding all other employees, guards and supervisors as defined by the Act.

The hearing officer found that the parties did not intend to include accountant Surmeian in the stipulated unit and therefore that the Union's challenge to her ballot should be sustained.[10] The Employer excepts, arguing that the unit description in the Agreement is ambiguous and, therefore, that the Board is required to look to extrinsic evidence and, if necessary, apply the community-of-interest test. In the Employer's view, both the extrinsic evidence and the community-of-interest factors require including Surmeian in the stipulated bargaining unit. We find that the Employer's exceptions have merit.

The Board applies the three-part test set forth in *Caesars Tahoe*, 337 NLRB 1096 (2002), to determine whether a challenged voter properly is included in the stipulated bargaining unit. Pursuant to this test:

> the Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test.[11]

In applying the first prong of the *Caesars Tahoe* analysis, the Board must determine whether the stipulated unit is ambiguous. In doing so, the Board compares the "express language of the stipulated unit with the disputed classifications." *Northwest Community Hospital*, 331 NLRB 307, 307 (2000) (citing *Viacom Cablevision*, 268 NLRB 633 (1984)). The Board will find that the parties have "a clear intent to include those classifications matching the description and a clear intent to exclude those classifications not matching the stipulated unit description." Id. Accord: *Bell Convalescent Home*, 337 NLRB 191 (2001).

In applying this test, some general rules have developed. For example, where the express language of the stipulation does not include or exclude the contested classification, the Board has found that the parties' intent with respect to that classification is not clear. *Caesars Tahoe*, 337 NLRB at 1097–1098 (explaining that "the failure to list a disputed classification does not establish that the parties clearly intended to omit that classification"). See also *R. H. Peters Chevrolet*, 303 NLRB 791, 792 (1991); *Lear Siegler*, 287 NLRB 372, 373 (1987). In addition, where the stipulation specifically enumerates the job classifications that are included in the unit, the classification at issue is not among them, "and there is an exclusion for 'all other employees,' the stipulation will be read to clearly exclude that classification." *Bell Convalescent Home*, 337 NLRB 191 (citing *National Public Radio, Inc.*, 328 NLRB 75 (1999), and *Prudential Insurance Co.*, 246 NLRB 547 (1979)).

Applying these principles, the hearing officer found that there was no ambiguity with respect to the parties' intent to exclude Surmeian from the bargaining unit. In his view, the unit description in the Agreement is based on job titles, and Surmeian's job title "accountant" is not included in the stipulated unit. Moreover, the "exclusions" portion of the stipulated unit expressly excludes "all other employees." Therefore, the hearing officer concluded that the parties unambiguously intended to exclude Surmeian from the unit. We disagree.

Contrary to the hearing officer, we find that the Agreement is ambiguous, i.e., it is subject to more than one interpretation. See, e.g., *Gala Food Processing*, 310 NLRB 1193, 1193–1194 (1993) (finding stipulation ambiguous where subject to at least two interpretations). The unit description begins with "all full-time and regular part-time employees." The next word is "including," followed by a list of job classifications. It is unclear

[9] The Employer's argument that Clark's involvement in the hiring process constitutes supervisory authority is further undermined by Grace's testimony that, if Clark is unavailable, he has Surmeian or any available clerical substitute for her.

[10] Despite finding that the parties did not intend to include Surmeian in the unit, the hearing officer inadvertently recommended that her ballot be opened and counted. Because we reverse his finding that Surmeian is excluded from the unit, we need not correct this error.

[11] 337 NLRB at 1097.

whether those words were intended to limit the prior word "all." The final phrase "excluding all other employees" might suggest that the word "all" refers only to employees within the listed classifications. However, the matter is not wholly free from doubt.[12] Accordingly, we must look to extrinsic evidence of intent.

The only extrinsic evidence presented is the unit description contained in the Union's original petition, which described the unit as:

> All full-time and regular part-time employees employed as Board liaisons, benefit administrators, cashiers, and clerks at the Employer's [sic] located at 111 North Hope Street; excluding all other employees, guards and supervisors as defined by the Act.

The Employer argues that the fact that the parties changed the words "employed as" in the petition, to "employees including" in the Agreement, demonstrates their intent to broaden the unit to cover more than the specified job titles. Although this argument may be reasonable, we are unable to find that the modification of the petition language alone is conclusive evidence of the parties' intent.[13] Therefore, we must apply the community-of-interest test.

When undertaking the community-of-interest analysis, the Board applies the following factors: degree of functional integration, nature of employee skills and functions, common supervision, interchangeability and contact among employees, work situs, working conditions, and fringe benefits. *Caesars Tahoe*, 337 NLRB at 200. Application of these factors strongly favors including Surmeian in the unit.

Surmeian's skills and functions are very similar to those of the other office employees. On a day-to-day basis, Surmeian spends 50–60 percent of her time performing general office work and committee work, and only 30–40 percent of her time performing actual accounting work.[14] The office work—selling tickets, waiting on customers, answering phones, and cashier functions—involves exactly the same duties the other unit employees perform. Likewise, the committee liaison work—undertaking research, preparing reports, taking and typing minutes—is the same as that performed by other unit employees who serve as committee liaisons.

In addition, Surmeian's working conditions are identical to those of the other unit members. Surmeian has a cubicle in a work area that she shares with other unit members, and she shares the same lunchroom and restrooms. She also shares common supervision with the other unit members, has constant interaction with them, and receives the same fringe benefits.

The only evidence that weighs against finding that Surmeian shares a community of interest with the other office workers is that she is paid considerably more than most of her coworkers. However, we do not find that this disparity in pay outweighs the other factors, all of which favor including Surmeian in the unit.[15]

Therefore, we reverse the hearing officer and find that the job classification "accountant" is included in the unit. Accordingly, Surmeian's ballot should be opened and counted.

DIRECTION

IT IS DIRECTED that the challenges to the ballots cast by Sonae Clark and Julie Surmeian are overruled, and that the Regional Director shall, within 14 days from the date of this Decision, Direction, and Order, at a time, date, and place to be announced, open and count their ballots, prepare and cause to be served on the parties a revised tally of ballots, and issue an appropriate certification.

ORDER

It is ordered that the proceeding is remanded to the Regional Director for Region 21 for further processing consistent herewith.

Dated, Washington, D.C. November 28, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[12] Compare, *Bell Convalescent*, supra, where the parties defined the stipulated unit as: "All full-time and regular part-time certified nursing assistants, restorative nursing assistants, nursing assistants, cooks, dietary aides, activities aides, housekeeping, maintenance, and laundry employees at the employer's facility . . .; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined by the Act." 337 NLRB 191 fn. 2 .

[13] Compare, *Gala Foods*, 310 NLRB at 1193–1194 (relying on original petition plus parties' communications through Board agent leading up to signing stipulated election agreement).

[14] Office Manager Grace testified that there is not enough accounting work for a full-time position and that the accounting work Surmeian performs is very basic. In his view, Surmeian performs little more than simple bookkeeping functions. According to Grace, Surmeian's job title is "accountant" because she requested that title.

[15] Surmeian was paid more in part because she had been employed by the Employer for almost twice as long as most of the other unit employees. In addition, Office Manager Grace testified that the Employer "inherited" Surmeian, and her high pay rate, from LADWP, where she had been employed. Grace believed that her salary was too high, but felt that it was unfair to reduce it.